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Do Scandinavians Care about International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts

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Abstract

Although Scandinavians are often celebrated as the vanguards of human rights and international law, we know little about whether courts and judges in these countries have embraced those international courts and conventions that they themselves helped establish after the Second World War. This article presents original and comprehensive data on three Scandinavian courts' citation practice. It demonstrates that not only do Scandinavian Supreme Courts engage surprisingly little with international law, but also that there is great variation in the degree to which they have domesticated international law and courts by citing their case law. Building on this author's previous research, it is argued that Norway sticks out as much more engaged internationally due to a solid judicial review tradition at the national level. It is also argued that Scandinavian legal positivism has influenced a much more reticent approach to international case law than would normally be expected from this region in the world.

* From 2012–2015 the author was Professor II in Public Law at the PluriCourts Centre, at the University of Oslo. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of the Danish National Research Foundation's Centre of Excellence for International Courts (iCourts). I would like to thank colleagues at iCourts and Pluricourts for valuable comments to this article and to my evolving research on citations and legitimacy of ICs in general over the past years. I would also like to thank commentators at a conference on Nordic exceptionalism at the EUI in May 2016 and for comments at other international conferences over the past four years and of course to the anonymous review conducted by the *NJIL*. Most gratitude goes, however, to my research assistant Kristoffer Kohn Schaldemose for helping me with the collection of data and the designing and presentation of results and to Majka Holm for helping with the fine tuning of the manuscript. Any remaining faults or mistakes rest of course with me alone.

Keywords

supreme courts – citations analysis – Scandinavian judges – majoritarian democracy – judicial review – legal positivism – international law – international courts

1 Introduction

In his book *Political Order and Political Decay* from 2014, Francis Fukuyama spends quite some time on what he calls “the getting to Denmark problem”.¹ Denmark is, according to Fukuyama, an ‘idealized place’ that all countries should strive to come to look like and he underscores how Denmark successfully made the transition from patrimonial to modern state without having rulers falling into the trap of mixing personal and public interests.² The description of Denmark could just as well have been of the other Nordic countries. In particular, since the Second World War, the Nordic states have often been portrayed as “champions of international law and human rights”,³ as “moral superpowers”,⁴ and as “global good Samaritans”.⁵ The three Scandinavian countries, Sweden, Denmark and Norway, together of course with their Nordic brothers, Finland and Iceland, are in other words examples to be followed. They have been presented (and presented themselves) as frontrunners when it comes to human rights, the handing over of peace prizes but also when it comes to signing up to international courts, international law treaties and conventions. At least this has been the official picture. What is much less known is that the Scandinavians have displayed an enormous hesitance when it comes to the frequency by which they have domesticated the values they themselves stand for. For instance, the case law of those international courts they helped set up after the Second World War. The research and data presented in this article try to document this ‘lacking domestication’ quantitatively for the first time. It also deciphers the differences among the three Scandinavian countries (which are

1 F. Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (Profile Books Ltd., London, 2014) pp. 40, 751.

2 *Ibid.*, p. 41.

3 J. Christoffersen and M.R. Madsen, ‘The End of Virtue? Denmark and the Boomerang of the Internationalisation of Human Rights’, 80:3 *Nordic Journal of International Law* (2011) p. 259.

4 A.S. Dahl, ‘Sweden: Once a Moral Superpower, Always a Moral Superpower?’, 26:4 *International Journal* (2006) pp. 859–908.

5 A. Brysk, *Global Good Samaritans. Human Rights as Foreign Policy* (Oxford University Press, New York, 2009).

significant) and gets behind the more trivial explanations of their hesitance and the variance among them. The research presented here is unique as it draws on a newly established database, which has traced citations to international law in Danish, Swedish, and Norwegian Supreme Courts as far back as the 1950s. The empirical data presented shows that Norway sticks out as much closer to the conventional image of the Nordic states when it comes to citing the treaties it has signed up to and the case law of treaty-monitoring bodies. Sweden and Denmark do far worse falling surprisingly behind the Norwegian court's domestication of international law.

The article starts off by presenting the global context in terms of an explosion in international courts and international adjudication since the Second World War. In this period states have also accepted a general juridicalisation at the *national level* with the establishment of strong constitutional courts. Interestingly this evolution has not been reflected in the Nordic countries. After setting the stage in section 2, the article discusses and defends the theoretical (and methodological) claim promoted in this research, namely that the legitimacy of international courts and conventions can be attributed to how much they are cited by national judges. As the role of precedence is central to citation studies in general, the following section discusses the role of precedence in international law, and in relation to the Scandinavian countries⁶ having a strong dualist tradition. The article then presents the data and the methodology behind the quantitative data set and presents some descriptive statistics comparing the three Scandinavian countries. Finally, the article ends by discussing the differences among the three Supreme Courts by drawing on my own previous research on the importance of national judicial review for international engagement,⁷ as well as, the role of Scandinavian legal positivism as a possible explanatory factor for understanding the strong emphasis of the lawmaker and preparatory work for judges and national courts in Scandinavia.

6 I use Nordic and Scandinavian more or less interchangeably in this article, knowing of course, that the two are often distinguished.

7 See M. Wind, 'When Parliament comes first: The Danish Concept of Democracy meets the European Union', *Nordic Journal of Human Rights* 2 (2009) pp. 272–289; M. Wind, D.S. Martinsen and G.P. Rotger, 'The Uneven Legal Push for Europe', 10:1 *European Union Politics* (March 2009) pp. 63–88; M. Wind, 'The Nordics, the EU and the reluctance towards supranational judicial review', 48:4 *Journal of Common Market Studies* (2010) pp. 1039–1063; J.E. Rytter and M. Wind, 'In Need of Juristocracy? The Silence of Denmark in the development of European Law', 9:2 *International Journal of Constitutional Law* (2011) pp. 470–504.

2 The Rise of International Courts and the Lacking Domestication of International Law in Scandinavia

Since the first permanent international court (IC) was set up in 1922, states have established almost 25 international judicial bodies. Altogether four global courts and 20 regional courts have emerged, and many more are in the making.⁸ At the same time within the past 15 years more than 150 countries around the world have introduced constitutional democracy defined as “democracy where constitutional judicial review of legislation by strong constitutional courts” is regarded as a corner stone.⁹

This is quite a dramatic global development, which is replicated (and in some cases even originating) in Europe where most countries, including the new democracies in Central and Eastern Europe, have embraced German-style constitutional democracy in the post war period.¹⁰ Both the setting up of an increasing number of ICs and the establishment of strong national constitutional structures with significant review powers to courts can be attributed to the general rise and spread of international human rights after the Second World War. It is perhaps a bit of a paradox as Christoffersen and Madsen put it, that it was in Europe that the human rights convention was invented and designed¹¹ as we are dealing with a continent which had committed an excessive number of human rights atrocities during the war. It was also a continent, which after the war with its imperial ambitions “manipulated the very same notion [of human rights] limiting its applicability to a selected group of individuals and instrumentalized human rights as part of their self-described ‘mission civilisatrice’ abroad”.¹²

The Scandinavian countries joined the European Convention of Human Rights (ECHR) at a fairly early stage in the beginning of the 1950s. However,

8 C. Romano, K. Alter and T. Shany (eds.), *The Oxford University Press Handbook of International Adjudication* (Oxford University Press, Oxford, 2013); K. Alter, *The New Terrain of International Law* (Princeton University Press, Princeton, 2014).

9 R. Hirschl, *Towards Juristocracy* (Harvard University Press, Cambridge, 2004).

10 A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, Oxford, 2000).

11 See E. Bates, ‘The Birth of the European Convention of Human Rights – and the European Court of Human Rights’, in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, Oxford, 2011); M. Rask Madsen, ‘The protracted institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence’, in Christoffersen and Rask Madsen, *ibid.*

12 Christoffersen and Rask Madsen, *ibid.*, p. 1.

it soon became clear that the Convention was mainly for external consumption and not directed at these countries themselves.¹³ Scandinavians such as Dag Hammarskjöld,¹⁴ who was a prominent figure in the United Nations (UN) as the second secretary general from 1953–1961, came to “embody the notion that small states should seek to exploit international forums such as the UN and therefore generally support the drafting of binding international law as a means for international peace and cooperation”.¹⁵

In other fields of the social sciences like international relations, which emerged as an independent discipline after the Second World War, the narrative that Scandinavians had a special humanitarian approach to international law, human rights and peaceful coexistence also became prominent. Wæver and Kristensen¹⁶ argue that the Scandinavian IR discipline started out with a strong focus on peace studies and a deep-felt criticism of power politics – a fact that underscored also the academic community’s commitment to a special Nordic focus on peace operations, human rights and international cooperation in general.¹⁷ However, also here the dominant hidden assumption seemed to be that human rights were primarily for export and not something that the Scandinavians themselves needed to address. Even after the human rights convention was incorporated into national law in the beginning of the 1990s, more than 40 years (!) after it was signed, the Scandinavian countries avoided to fully embrace it. But what would a true domestication of human rights have entailed? Following Christoffersen and Madsen it would be:

taking international law down from its elevated position in terms of a universal commitment to peace and international cooperation, which had marked most of the 20th century Scandinavian legal internationalism, and instead bringing it into the everyday practice of law and politics.¹⁸

One way of “taking international law down from its elevated position” was for domestic courts to start citing it and thus rely on the convention and the Strasbourg Court’s case law in their own decisions. Something that the

13 Christoffersen and Rask Madsen, *supra* note 4, p. 258.

14 And before him, the Norwegian Trygve Halvdan Lie who was the first secretary general.

15 Christoffersen and Madsen, *supra* note 4, p. 259.

16 O. Wæver and P.M. Kristensen, ‘Scandinavian IR – Less Identity, More Influence?’, forthcoming.

17 Wæver and Kristensen argue among other things that Norway is the country in the world with the largest number of IR scholars signing up to liberalism.

18 Christoffersen and Madsen, *supra* note 4, p. 258.

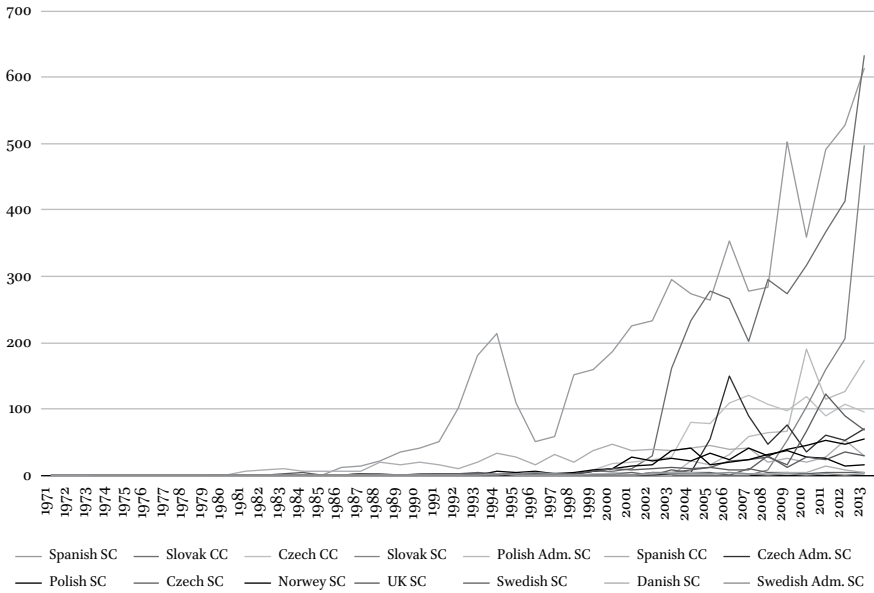


FIGURE 1 *Selected Supreme Court citations to the ECtHR*

Scandinavian courts have turned out to be very hesitant to do – even today. Fig. 1, which is generated from an iCourts database collecting citations from all European courts, illustrates that the Nordic countries' courts are among those least likely to cite the oldest and most well-known human rights court in the world: the European Court of Human Rights (ECtHR).

Neglecting those international court-decisions that your own government has signed up to by not citing them is a rather clear statement as we are to see below.

However, it was not only the domestication of human rights and international law that never really penetrated the Scandinavian countries. It was also the general idea of constitutionalism. Apart from Norway, which actually adopted a constitutional court with rather strong review functions already in 1866,¹⁹ Denmark and Sweden preserved strong parliaments and no constitutional courts. The Supreme Courts of the latter two democracies have over the years conducted no or only very weak constitutional review.

In Denmark it has only happened once in 170 years that the Supreme Court has set aside a piece of legislation adopted by parliament. It was in the case

19 See A. Kierulf, *Taking Judicial Review Seriously: The Case of Norway* (Oslo University Press, Oslo, 2014) p. 6.

of the Tvind law in 1999, which was considered unconstitutional.²⁰ In Sweden judicial review was explicitly forbidden in the Constitution until 1979 and is even today significantly limited.²¹

The same goes for Finland where constitutional review was forbidden until 2000.²² The mantra has thus been ‘no one over or above the parliament’ in the Nordic countries²³ – a mantra that is still highly dominant in the public discourse. Following the distinction between constitutional and majoritarian democracies presented by legal philosopher Ronald Dworkin this means that the Scandinavian countries – perhaps with the important exception of Norway – can be categorised as majoritarian democracies.²⁴ More specifically, what characterises a majoritarian (as opposed to constitutional) democracy is exactly that there is no tradition²⁵ for conducting judicial (constitutional) review by courts and that the vision of the majority in parliament (elevated above the other branches of government) holds strong.²⁶ The point that I am

20 J.P. Christensen, *Domstolene – den tredje statsmagt* (Aarhus Universitets forlag, Aarhus, 2003).

21 J. Nergelius, ‘Judicial review in Swedish law’, 27:2 *Nordic Journal of Human Rights* (2009) pp. 142–160.

22 T. Ojanen, ‘From Constitutional Periphery toward the Center – transformation of Judicial Review in Finland’, 27:2 *Nordic Journal of Human Rights* (2009) p. 195.

23 Until 1979 judicial review was forbidden in Sweden (and very restricted until 2001), and in Denmark there is no mentioning of this role to the courts in the Constitution. Only once in 170 years has the Danish Supreme court set aside a piece of legislation adopted by the Danish Parliament. This was in the *Tvind* case handed down by the Danish Supreme Court on 19 February 1999 (U 1999.841 H). See J. Nergelius, ‘North and South: Can the Nordic States and the European continent find each other in the constitutional area – or are they too different?’ in M. Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries*, (Nordic Council of Ministers, Nord, Copenhagen, 2001); see also Wind, ‘When Parliament Comes First: The Danish Concept of Democracy Meets the European Union’, 2 *Nordic Journal of Human Rights* (2009) pp. 272–289; Rytter and Wind, *supra* note 8, pp. 470–504.

24 A similar distinction as the one presented by Dworkin is found in a more recent book by Richard Bellamy from 2007 who distinguishes between legal and political constitutionalism where he strongly defends political constitutionalism (i.e. majoritarian democracy). See R. Bellamy, *Political Constitutionalism* (Cambridge University Press, Cambridge, 2007).

25 It is important to emphasise here that I am not claiming that constitutional or judicial review never takes place or is still forbidden. My point is merely – but never the less importantly – that constitutional review is rarely practiced and considered problematic by politicians as well as the judges themselves.

26 R. Dworkin, *Freedoms Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, MA, 1996).

making here, and have made elsewhere, is thus that the absence of a solid review institution in these countries has significant repercussions, not just for the conception of democracy in these countries but also for their relationship to supranational regulation in terms of international and European law.²⁷ This is not meant to imply that we are dealing with a static situation but, as Ran Hirschl has pointed out, the Scandinavian countries constitute in this respect an unexplored laboratory of countries, which have deliberately rejected constitutionalism.²⁸

While in previous research attention has been paid to the limited number of preliminary questions forwarded to the European Court of Justice from the Nordic states, explained in part by the lack of a solid judicial review tradition,²⁹ no attention has been given to the much broader debate of international law. We in fact have very little systematic knowledge about how, whether and to what degree the three Scandinavian countries have domesticated and 'downloaded' the international law treaties and ICs' case law that their governments have signed up to in their own national legal orders. The question could also be asked as McCrudden does in his article on national courts' citation to the Convention on the Elimination of Discrimination Against Women (CEDAW). Do national judges primarily act as domestic actors "who use international law in order to advance domestic goals"?³⁰

In the following I will take a closer look at the role citations and precedence play in national and in particular in international law. This part draws on recent American political science research investigating the role of citations and precedence in international law. What this research demonstrates is that: how and whether judges cite international courts and conventions can be seen as a proxy for the acceptance and perceived legitimacy of the normative international judicial development since the Second World War. The link between citations to international courts and conventions and their perceived legitimacy will also be a central assumption in the present article where the Nordic countries are in focus.

27 Wind, *supra* note 8, pp. 1039–1063.

28 R. Hirschl, 'The Nordic counter narrative: Democracy, human development, and judicial review', 9:2 *International Journal of Constitutional Law* (2011) pp. 449–469.

29 See the author's previous research which is also the subject of Ran Hirschl's comment: Wind, 'When Parliament Comes First', *supra* note 8, pp. 1039–1063; Rytter and Wind, *supra* note 8, pp. 470–504.

30 C. McCrudden, 'Why do National Court Judges Refer to Human Rights Treaties? A Comparative International Law analysis of CEDAW', *Public and Legal Theory Research Papers*, paper no. 482, 26 October 2015, online at <SSRN.COM/ABstract=2680458>, visited on 5 July 2016.

3 Citing International Cases and the Question of Legitimacy

It is sometimes argued that it is less problematic whether national judges cite the case law of those international courts that their government has signed up to as IC decisions are 'one shot' events that concern only the parties involved. As the International Court of Justice points out in Article 59 of its founding statute "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".³¹ The dogma that international courts do not create precedent is however strongly contested as ICs' case law is increasingly cited, not only by the ICs themselves but also by legal practitioners, national courts and scholars.³² If we look at the European courts alone, both the ECtHR and the European Court of Justice (ECJ) have already a long tradition for creating precedent through their case law. This also goes for more specialized courts. Krzyztof Pelc has put it more bluntly, referring to ICs and international law in the following way "[b]inding precedent [in international law] may be a legal fiction, but it is one that courts and countries tacitly accept to be bound by".³³ Things are thus very different today, and it makes sense to say that judges in civil as well as common law systems³⁴ cite previous cases from both the national and the international level to build a persuasive and legitimate argument. Doing so is, however, not only about persuasion and consistency. It is also about lending legitimacy to the cited court. Any specific reference may thus mirror the reputation of the specific court cited and its judges.³⁵ Helfer and Slaughter also argue that courts "enhance each other's prestige" by citing each other's decisions.³⁶

31 Statute of the International Court of Justice, online at <www.icj-cij.org/documents/?p1=4&p2=2>, visited on 5 July 2016.

32 See also A.M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004); K. Alter, *The New Terrain of International Law* (Princeton University Press, Princeton, 2014).

33 K. Pelc, 'The Politics of Precedent in International Law: A Social Network Application', 108:3 *American Political Science Review* (2014) pp. 547–564; see also A.-M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004); K. Alter, *The New Terrain of International Law* (Princeton University Press, Princeton, 2014).

34 There used to be a great divergence in the use of precedence between the two different types of legal systems. This is however no longer considered the case.

35 See W. Sandholtz, 'How domestic courts use international law', 38:2 *Fordham International Law Journal* (2015) pp. 596–536; C. McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW', *Public and Legal Theory Research Papers*, paper no. 482, 26 October 2015, online at <SSRN.COM/ABstract=2680458>, visited on 5 July 2016.

36 L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Transnational Adjudication', 107 *Yale Law Journal* (1997) pp. 325–326; M. Wind, 'Do Scandinavian judges care about

Lupu and Voten have shown that “judges cite precedent at least in part to provide strategic legitimation for their decisions”.³⁷ In their very interesting study of the citation practice of the European Court of Human Rights, they moreover demonstrate that the court cites about ten of its own previous cases in each new case.³⁸ The fact that international courts cite their own cases tells us that precedence is important to ICs themselves when trying to foster influence and establish a coherent, predictable and legitimate body of law. Since treaties and IC case law is also collected in large prestigious volumes and studied in law schools all over the world, one must assume not only that precedence plays an increasing role in modern international law, but also that national courts deciding international law related cases will take the case law into account and even cite it when appropriate. In particular, if the national judges come from countries with a solid international law tradition.

The Nordic countries and their national courts would most certainly be expected to belong to such a category and to be in the forefront when it comes to lending legitimacy to ICs, treaties and conventions by citing them. However, as we are to see below, the number of treaties signed as well as the growing caseload from ICs since the 1970s has gone more or less unnoticed by the Scandinavian judges.³⁹ A liked and often used explanation (or even excuse) for this among Nordic lawyers has been the dualist approach to international law which has dominated all legal thinking in this part of the world for centuries.⁴⁰ Here decisions by ICs (or international treaties) are not considered part of national law unless national legislative acts have turned them into legal sources in national law through legislation.⁴¹ Alf Ross (1899–1979), an internationally recognized Danish legal philosopher who was generally critical of international law due to its natural law origins, saw national law and international law as representing two irreconcilable legal realms.⁴² As a consequence, international

international law?, in M. Wind (ed.), *International Courts and Domestic Politics* (Cambridge University Press, Cambridge, forthcoming).

37 Y. Lupu and E. Voten, ‘Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights’, 42 *British Journal of Political Science* (2011) p. 438.

38 *Ibid.*

39 Christoffersen and Rask Madsen, *supra* note 4, pp. 257–258.

40 O. Bing, ‘Monism och dualism i går och i dag’, in R. Stern and I. Österdahl (eds.), *Folkkrätten i svensk rätt* (Liber, Malmö, 2012).

41 H. Palmer Olsen, ‘Præjudikatværdien af internationale domstoles afgørelser’, in J.H. Danielsen (ed.), *Max Sørensen 100 år* (Djøf, Copenhagen, 2013) p. 102.

42 See the analysis of Ross and international law in M. Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order* (Palgrave, London, 2001), p. 9.

law could never establish precedence in Danish law in its own right.⁴³ You still find this point of view represented among Scandinavian judges and civil servants. However, in particular since the incorporation of the European Convention of Human rights into national law, the classical dualist conception has often been described as increasingly challenged. Not because politicians and judges suddenly changed their view on the requirement that the Convention could only have effect in national law when adopted through a legislative act in parliament (though only with ordinary and not constitutional law status), but probably more because the Strasbourg Court has been effective in clarifying the Convention in its own case law and thus confronted the excuse used by many Nordic judges and politicians that the Convention was too unclear and unspecific to be applied by national courts. In Norway one thus gradually started talking about a new 'semi-monism' or 'sector-monism'⁴⁴ indicating – at least among international law friendly legal scholars – that international law and international decisions had or perhaps rather would gradually take over as *the* national source of law.⁴⁵ In the late 1990s when all three Scandinavian countries were on board in the sense that they had all become firm partners of the European human rights regime, national judges could thus legitimately have used the Convention as well as the ECtHR's case law as a source in their own cases. Things did not turn out to be that easy however. Counter to what one might have expected Scandinavian Supreme Courts have been very conservative and hesitant when it comes to taking this new instrument into use. In Denmark politicians even spelled out in their preparatory works to the

43 H. Zahle, *Dansk Forfatningsret 2: Regering, forvaltning og dom* (Christian Eijler's Forlag, Copenhagen, 2001) p. 211 refers to Alf Ross for this understanding. H. Palmer Olsen cites former Supreme Court judge Torben Jensen for the same point of view as Ross in an article from 1990. "Under the current legal state of affairs the European Convention of Human Rights and its decisions ... is just as any other international regulation (apart from EU law) by the Human Rights Court non-binding in Denmark. In order to be so incorporation is necessary. The international law obligations deducible from the convention or the court will be irrelevant until this happens". Author's own translation from Danish.

44 In Danish legal theory, Professor Henrik Zahle called it 'practical monism'. See Zahle, *ibid.*, p. 21.

45 See D.T. Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar, Cheltenham, 2015); see also S.O. Johansen, *Den internasjonale rettens påvirkning på norsk rett* (The Effect of International Law on Norwegian Law) (6 February 2014), PACTA nr. 23, available online on SSRN: <ssrn.com/abstract=2391683>; J. Helgesen, *Teorier om "Folkerettens stilling i norsk rett"* (Oslo, 1982); and J. Helgesen's chapter 12 on the role of international law in the domestic legal system in T. Eckhoff and J. Helgesen, *Rettskildelære*, 5. utgave (Universitetsforl., Oslo, 2001).

incorporation of the Convention that national courts should be careful not to independently develop the law on the basis of the Convention or the Strasbourg Court's case law.⁴⁶ One classical argument has as mentioned above been that conventions have been considered too broad and imprecise and thus unfit to be a serious source of law. However, if Supreme Courts (in agreement with politicians) initially abstained from relying on or even mentioning the European Human Rights Convention because it was too imprecise, this argument became obsolete as the ECtHR started clarifying the Convention's provisions in its own case law in the 1980s and onwards, making the Convention judiciable.⁴⁷ As Palmer Olsen puts it with regard to the Danish courts: "International courts' decisions – also those that do not concern Denmark specifically – ... should thus gain precedence in Danish law to the degree these decisions are used as precedents by these international courts themselves".⁴⁸

This has however not happened. In fact, quite the contrary as we are to see below. The conception of international law as a foreign element *and* the classical scepticism towards strong courts and constitutionalism in general contribute to a rather peculiar situation, where in particular Danish and Swedish judges – still – largely ignore international law. In the following the results of the data analysis will be presented together with some words about how the citations were collected. In the concluding section the findings will be debated and some tentative explanations as to why Scandinavian judges have never fully embraced the international courts and treaties that their governments have signed up to will be put forward.

4 Results and a Few Words on Methodology

Mattias Kumm once asked "[s]hould national courts in liberal constitutional democracies enforce international law even when there is no specific authorization from the legislative or executive branches to do so?"⁴⁹ The question is provocative because it questions the so-called internationalist approach to international law that "[n]ational courts should enforce international law, irrespective of national law".⁵⁰ But, according to Kumm, whether national courts actually play this role is an *empirical* and not a normative question. The main

46 See also Rytter and Wind, *supra* note 8, pp. 470–504.

47 See Palmer Olsen, *supra* note 42, pp. 114–115.

48 *Ibid.*, p. 106.

49 M. Kumm, 'The International Rule of Law and the Limits of the Internationalist Model', 44:1 *Virginia Journal of International Law* (2003) p. 21 *et seq.*

50 *Ibid.*

concern of this project is however *not* whether Scandinavian courts enforce international law, but rather whether they have deliberately domesticated and thereby legitimized it by citing it in their own case law. The project presented here however raises similar questions to those presented by Kumm about the interaction between the two legal spheres. It moves from normative assumptions about how things ought to be (and perhaps are assumed to be) to trying to understand to what degree Scandinavian judges in the Supreme Courts actually have embraced the treaties and conventions that Sweden, Denmark and Norway have signed up to since the 1950s.

Below the preliminary findings from a huge data set is presented. The data has been collected by a team of researchers at the Centre of Excellence for International Courts (iCourts) at the University of Copenhagen. In order to count the citations made by the Scandinavian Supreme Courts to ICs' case law, a comprehensive and original quantitative data set has been assembled from scratch. The goal has – as mentioned briefly already – been to count how many times the Supreme Courts in the three Scandinavian countries have cited an IC's case law, a treaty or a convention in their own case law since the 1950s. The aim has been to be able to distinguish between the different courts, treaties and conventions, and thus determine exactly which specific court, treaty or convention was cited.⁵¹ Finally, to show developments over time, the date of the citation was coded for as well.

As the Scandinavian Supreme Courts have delivered thousands of judgments since 1950, coding all the judgments manually would be extremely time-consuming. To overcome this challenge, parts of the coding process had to be automatized based on innovative computer software. The automatic coding process has thus been an essential and innovative part of this project.⁵²

51 The aim was as well to be able to determine whether it was the court, the parties or both the court and the parties to the case that made the citation in any given Supreme Court's decision.

52 The first step in the automatized coding process was to create a codebook. A codebook is a detailed statement of instructions to coders on how to facilitate the coding. The codebook is a tool to increase the possibility of replicating the study in a reliable way at a later point in time. That is, different coders should be able to replicate the study and get the same results. This clearly adds to the quantitative methodology's validity. There are many different ways in which to formulate a codebook. In this case the codebook presents and describes all variables, and all the possible values these variables might take. It further presents the numbers (*i.e.* codes) that should be typed in the coding scheme given the different possible values of the variables. The complete codebook, "Codebook – Scandinavian Supreme Courts' citations to international courts" was developed by Kristoffer Schaldemose at iCourts in 2014.

The citations by the national Supreme Courts to the ICs were detected by using a method based on legal keywords. The relevant keywords were essential and not identical to the different variables in the codebook. In order to detect all the citations made to, for example, the ECtHR in the Danish Supreme Court cases, all possible ways in which a particular national court refers to the ECtHR had to be included. Obviously it had to be taken into account that Supreme Courts do not cite the different courts in a uniform or standardised way. For instance, the Danish Supreme Court uses expressions such as 'EMK', '*Den Europæiske Menneskerettighedsdomstol*', '*Domstolen i Strasbourg*' (the Court in Strasbourg). Consequently, detecting all the relevant keywords was a difficult task and had to be individualised from country to country. Through legal consultancy and advice from experts the keywords were identified manually by coding a large sample of Supreme Court decisions. All the different expressions used when citing the different ICs, treaties or conventions were written down and this work continued until a reasonable amount of keywords for all the relevant ICs had been identified. There is of course always the risk of capturing so-called 'false negatives', meaning that your analysis may capture citations that cannot be regarded as a 'true' precedent in support of a previous case. It can be argued, however, that even citations that (explicitly) criticise the cases cited – what Fischman refers to a 'negative references' – demonstrates the specific IC's impact if not its perceived legitimacy. If a national court really perceives a given IC as illegitimate, why bother to cite case law from the IC at all? In other words, while 'negative references' might not be 'true' precedents, the project build on the notion that they certainly imply that the national court accepts the IC as a legitimate source of law.⁵³

Based on the manually detected keywords, it was thus possible using a specific computer software to search for and find these keywords, and hence automatically code the court decision or judgment. Variables such as date, ID-number and so on were also coded.⁵⁴

53 See J. Fishman, 'Reuniting "Is" and "Ought" in Empirical Legal Scholarship', 162:1 *University of Pennsylvania Law Review* (2013) pp. 117–168; R. Anderson, 'Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeal', 76:315 *Missouri Law Review* (2011) pp. 318–373.

54 Although a significant part of the coding process has been automatized, a considerable amount of manual test-coding has been necessary in order to increase the reliability in the study. In other words, the coding was constantly improved by adding new and improved keywords, which optimised the computer script. The process is truly iterative: The keywords were detected manually and created a computer script, which then was used to code a random sample of court decisions. Thereafter, a random set of these court decisions were coded manually and the findings compared with the automatized coding.

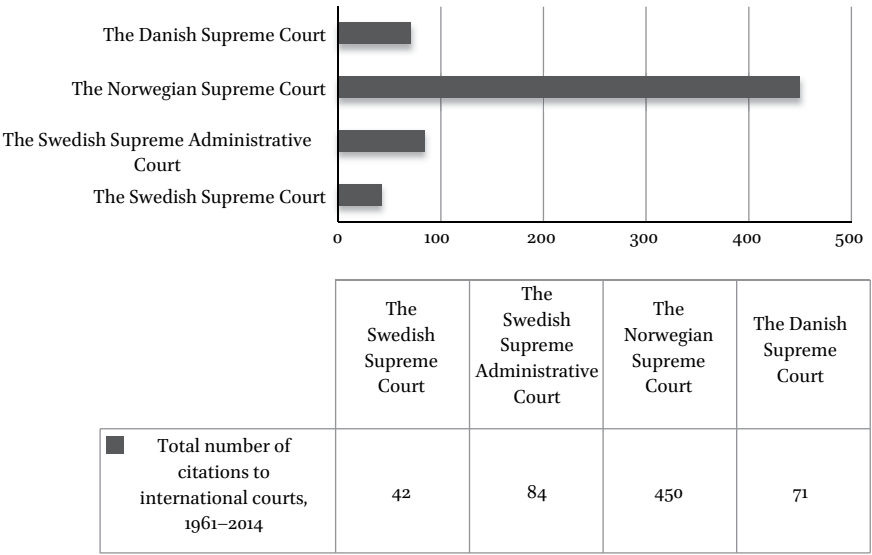


FIGURE 2 *Total number of citations to international courts, 1961–2014*

Fig. 2 presents the total number of citations to international courts made by Scandinavian Supreme Courts in their judgements and court decisions covering the time period 1961–2014. Although the present study only includes *three* countries (Denmark, Norway and Sweden) results of four Scandinavian Supreme Courts are included due to the fact that Sweden has two Supreme Courts: the ‘regular’ Supreme Court and the Administrative Supreme Court.

Fig. 2 clearly shows that the Norwegian Supreme Court refers much more frequently than both its Danish and Swedish counterparts, with 450 citations against 71 (DK) and 126 (the two Swedish courts put together). These findings support the hypothesis put forward in previous research that Norway with a strong national judicial review tradition will be more inclined to cite to international courts than majoritarian democracies with no such tradition like Denmark and Sweden.⁵⁵

Where Fig. 2 presented the number of citations to international *courts*, Fig. 3 focuses on the many international *conventions* and *treaties* that the Scandinavian countries have signed up to. It is rather interesting (but perhaps not surprising) that the Scandinavian courts refer much more often to the conventions and treaties than to international courts. While the Scandinavian

This was done over and over again. Following this technique, errors can be found and corrected thereby improving the reliability of the study significantly.

55 See A. Kierulf, *Taking Judicial Review Seriously: The Case of Norway* (Oslo University Press, Oslo, 2014).

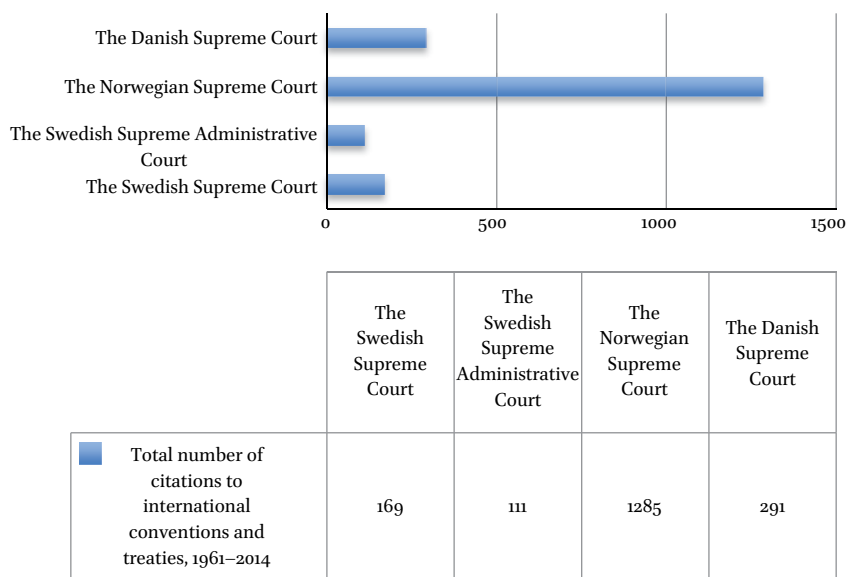


FIGURE 3 *Total number of citations to international conventions and treaties, 1961–2014*

Supreme Courts all together made 647 citations to international courts, they referred to conventions and treaties no less than 1756 times in the same period of time. This suggests that international law and treaties – which are based on ‘legislation’ and thus explicit ‘government/parliamentary consent’ – are perceived to be more legitimate than those international courts, which actually enforce international law.

As in the case of international courts, Norway is however also far ahead when it comes to making explicit citations to international conventions and treaties compared to its neighbouring countries. Norway thus run ahead with 1285 citations in the period from 1961–2014 compared to 291 in Danish case law and 280 in Swedish case law.

The extensive data set takes all relevant international courts into consideration. However, it is clear from Fig. 4 that only very few are considered relevant for the Nordic countries. In Norway, the ECtHR is clearly the most cited court. While the Danish and Swedish courts also cite ECtHR, they both cite the European Court of Justice more often.

While Norway generally cites international courts’ case law more frequently than Denmark and Sweden, both Denmark and Sweden cite the ECJ more often than Norway, which is not a member of the EU. It is interesting, however, that the Norwegian Supreme Court actually does cite the ECJ. This underscores of course that Norway is fundamentally penetrated by EU law although the European Free Trade Association (EFTA) court is the European Economic Area’s (EEA)

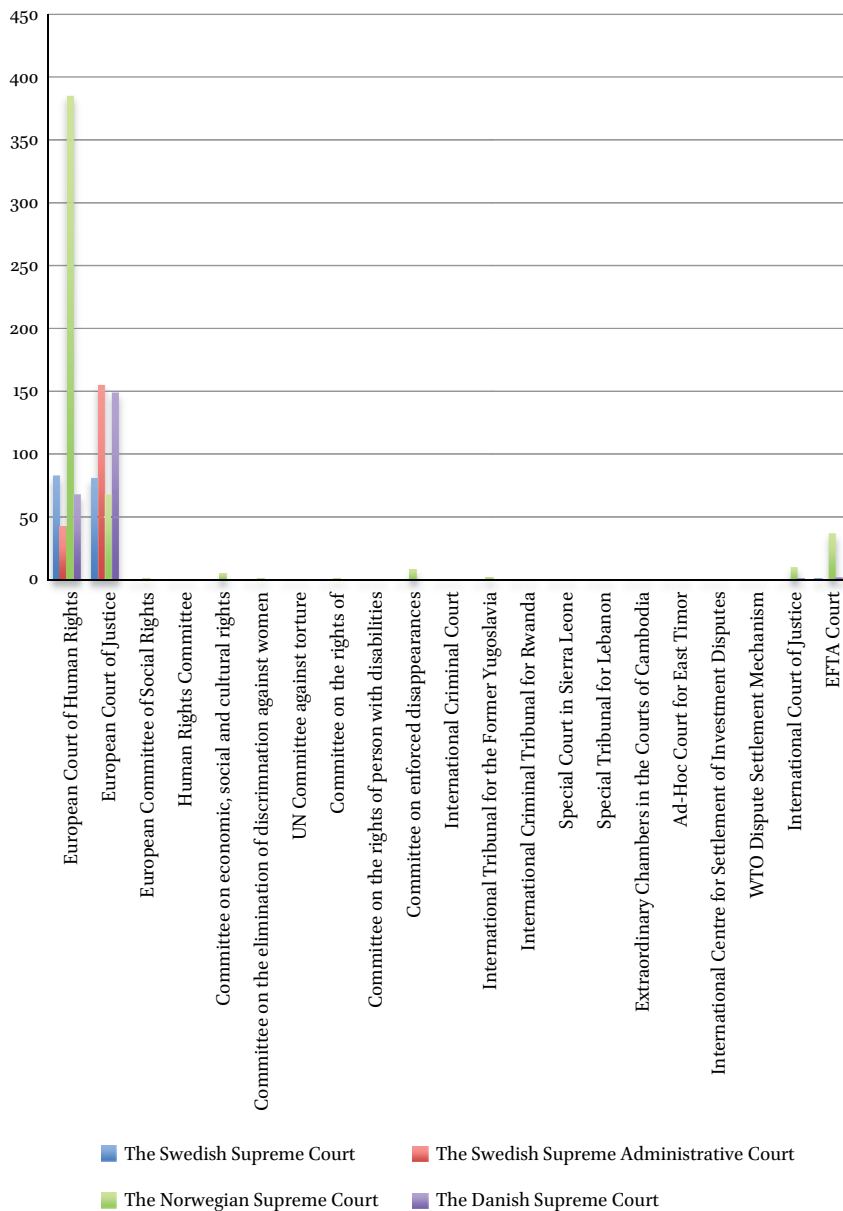


FIGURE 4 *Number of citations to different international courts, 1961–2014*

own court (which normally sticks closely to the ECJ's legal practice). It could be argued, that the ECJ should not be part of this study at all as EU law no longer reasonably can be considered to be characterised as international law.⁵⁶

56 J.H.H. Weiler, 'The Transformation of Europe', 100:8 *Yale Law Review* (1991) pp. 2403–2483.

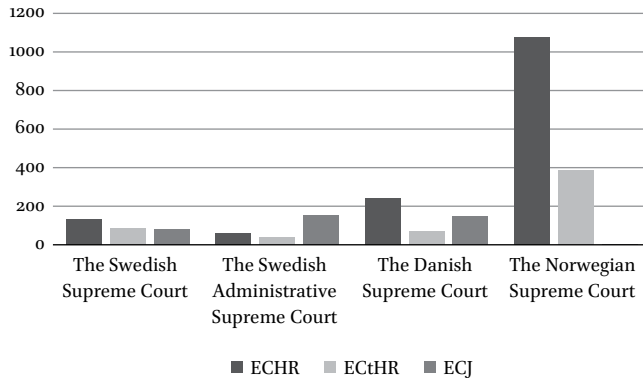


FIGURE 5 *Number of citations (selected conventions and courts), 1961–2014*

It is moreover interesting that Scandinavian courts practically only cite two courts altogether: the ECtHR and the ECJ – though Norway has also cited the ICJ and the EFTA court. No other courts are deemed relevant by the judges in the Scandinavian Supreme Courts.

Fig. 5 shows the number of citations by the four Scandinavian Supreme Courts to three selected courts and treaties, namely the ECHR, the ECtHR and the ECJ. The graph is rather interesting as it clearly shows that the Norwegian Supreme Court use international human rights case law in its own cases much more often than its Scandinavian neighbours. The causes for this clearly need to be studied more qualitatively as well, but it does raise some interesting questions about potential differences in the levels of human rights protection in the Scandinavian countries. It also urges us to look more into: legal and political traditions, the dominance of Scandinavian legal positivism where international law in general plays a somewhat inferior role, legal teaching in the universities, and transparency in the judiciaries. I will not be able to go into any of these explanations in detail here, but only suggest two elements, which are important and closely linked: the missing judicial review tradition at the national level, and the dominant positivist approach to law in general in Scandinavia, where statutes and preparatory works seem to be the most important sources of law for national judges.

5 Conclusions: Does the Influence of Legal Positivism and Majoritarian Democracy Explain Citation Frequency?

To what degree can legal traditions, ideas and visions about the role and status of international law in legal science explain the Scandinavian Supreme

Courts' citation practice? Before we get too far down this ally it is probably important to emphasise that how we think and traditionally have thought about the status of international law only partially explains the apparent ambivalence towards international law by the judges. However, when courts are hesitant to cite or rely on international legal sources, in particular courts' case law and less so treaties adopted through legislative acts by the contracting parties, this may – I will argue – have to do with the strong emphasis in this part of the world on legal statutes and the parliament as the prime lawmaker. The elevated position and role of the parliament *vis-à-vis* other branches of government is clearly also important when trying to understand the special Nordic rejection (apart perhaps from Norway) of a solid judicial review tradition at the national level, which otherwise has been a global phenomenon the past 25–40 years. Majoritarian democracy is and continues to be an almost indisputable value in the Scandinavian countries, also among judges themselves and the majority of professors who write the legal textbooks – though often only implicitly as they are only rarely explicit about their own conception of democracy.⁵⁷

In line with my previous research on the 'Reluctance towards supranational judicial review' among the Nordics in the EU,⁵⁸ the data collected here broadens the perspective to encompass international law supporting the thesis put forward previously that the presence or absence of a solid judicial review tradition at the national level potentially has strong implications for the willingness of national judges to cite, domesticate and lend legitimacy to international law (in particular ICS' case law) in their own legal practice.

Closely linked to majoritarian democracy is the special version of Scandinavian legal positivism⁵⁹ where positive law – seen as parliamentary statutes and legislative acts – are absolutely central. Courts play a very reticent role in political life in this part of the world at least when it comes to being active in

57 We have conducted a systematic but not yet published analysis of the description of international law (compared to national law) in legal textbooks in the Scandinavian countries. We explicitly excluded text-books by international lawyers as they would obviously be biased and much more positive about international law than the average and thus only included those describing the legal field in general. See Wind, *supra* note 36.

58 Wind, *supra* note 8, pp. 1039–1063.

59 See J. Bjarup, 'The Philosophy of Scandinavian Legal Realism' 18:1 *Ratio Juris* (March 2005) pp. 1–15. It is here argued that (in order to destroy the distorting influence of values) one should destroy the metaphysics and normative aspects of legal and create a scientific theory of law. Central figures were Axel Hägerström and the Danish philosopher and legal scholar Alf Ross. They both focused on positive law as a system of rules in terms of behavioural regularities among human beings. It builds on the idea of positive law as based on statutes and leaves very little room for the normativity of the law.

striking down and scrutinising law-making.⁶⁰ A survey from 2006 concluded that judges in Sweden and Denmark see themselves as closer to a '*Bouches de la loi*'-conception than as lawmakers, or active constitutional guardians, and that they felt quite comfortable with this.⁶¹

The legal text, as represented by statutes and other legislative documents, is thus the most important framework of interpretation for judges. Reliance on considerations other than the political intention of the legal provision is often (but not always) regarded as judicial policymaking, which judges ought to abstain from as far as possible. This also explains why the *travaux préparatoires* become very central for the judges because they inform about the intentions and the will of the legislature, and thus the political majority in parliament. Following former Professor J.P. Christensen – now a judge at the Danish Supreme Court – the understanding of the unconstrained legislature as the essence of democracy can to a large degree be attributed to the Danish legal philosopher and legal positivist Alf Ross, an understanding which has dominated law students in Copenhagen for generations.⁶² As Christensen puts it, "[f]or almost 40 years did this idea dominate the law faculty at the University of Copenhagen".⁶³ As he further puts it in a footnote: "Not until the 2nd edition of Henrik Zahle's *Dansk Forfatningsret* from 1996 did anyone claim that the §3 in the constitution limits the power of the legislator ..."⁶⁴

Alf Ross has played and continues to play a central role for many Scandinavians' conception of international law. In particular Ross' unease with international law's natural law origins has played a role. Though Ross has also been misinterpreted,⁶⁵ he was very clear in his views about the different bases

60 One way of putting it would be to say that in a positivist system of law, litigants or other legal actors would always know what the law is and thus not be surprised by an unwritten obligation or rule. Legal positivism in the Scandinavian version would also be very skeptical of judicial discretion. Legal positivism would expect judges to decide cases in accordance with the law (*bouches de la loi*), and not their personal preferences or moral considerations. See more in *West's Encyclopedia of American Law* (2nd edition, The Gale Group, Inc., Farmington Hills, MI, 2008).

61 Wind, *supra* note 8, pp. 1039–1063.

62 See J.P. Christensen, 'Ross og statsforfatningsretten', in Jakob von Holderstein Holtermann and Jesper Ryberg (eds.), *Alf Ross. Kritiske gensyn* (Djøf, Copenhagen, 2006). As he writes: "With Ross the division of power theory became a theory of the legislative branch's all-encompassing power. For almost 40 years this doctrine dominated the legal studies programme at the University of Copenhagen", p. 81, the author's translation from Danish.

63 *Ibid.*, p. 81, my translation from Danish.

64 *Ibid.*, p. 103, my translation from Danish.

65 Udgivet J. Holtermann, 'Naturalizing Alf Ross's Legal Realism: A Philosophical Reconstruction', 24 *Revus: Journal for Constitutional Theory and Philosophy of Law* (2014) pp. 165–186.

for international law as opposed to national law and about the hierarchy of legal sources. Ross emphasised in his international law book from 1942 that the most valid sources of international law were positive sources like treaty and customary law.⁶⁶ Common to these sources is that they are explicitly adopted by the states through legislation and practice, which is what defines them as 'positive'. Ross did not exclude more justice based sources but only acknowledged them to the degree that they were actually referred to and used by states, legal practitioners and judges. The status and role of law is based on whether the law is in fact respected and not due to their natural law origins. As he puts it "[a] realist theory of legal sources builds on experience".⁶⁷ The emphasis on positive and customary law also underscores that treaties adopted by states are more important than court cases, but that court cases may be important if they actually create precedence and are looked upon as authoritative.⁶⁸ The great scepticism against the natural law origins of international law is clear but also implies that human rights – and their natural law origins – were problematic for a Rossian type of Scandinavian realism, unless of course they were positivized in the sense of being put into treaties, customary law and adopted/practiced by states. It is in other words clear that in Ross' legal theory the state as a source of law plays an enormous role. Also in Sweden the legal positivism of Axel Hägerström (who strongly inspired the young Alf Ross) has been incredibly influential and often called the father of Scandinavian legal realism together with other Scandinavian scholars such as Herbert Tingsten and Karl Olivecrona.⁶⁹ The fact that Hägerström, like his later followers, were critical of natural law, arguing that all law should be based on experience, may have influenced, although to a varying degree, legal education in the Nordic states. Perhaps this also made judges sceptical towards more normative international law sources. It is thus telling that at the Faculty of Law at the University of Copenhagen there is neither a professor of human rights nor of international law.

I fully recognise that it is difficult to verify how Scandinavian legal positivism/realism may have directly influenced Supreme Court judges' citation practice. Much more research needs to be done in particular into how international law is taught in Scandinavian universities – both within law and political

66 A. Ross, *International Law: An Introduction* (Copenhagen: Nyt Nordisk Forlag, 1984); Wind, *Sovereignty and European Integration*, *supra* note 43.

67 Ross, *ibid.*, p. 110.

68 *Ibid.*, p. 55.

69 J. Nergelius, 'North and South: Can the Nordic States and the European Continent Find each other in the Constitutional arena – or are they too different?', in M. Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries* (Nord, Copenhagen, 2016) p. 81.

science. There is little doubt, however, that at least in Denmark and Sweden the division between positive/natural law rhetoric (law as morals vs law as facts) has had an impact on the way students, civil servants, politicians and judges have looked at international law and courts. It may thus also help us explain the weak domestication of international law among Supreme Court judges in Scandinavia.